International Court of Justice, Optional Clause

Malgosia Fitzmaurice

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A. Meaning of the Term

1 The term optional clause refers to Art. 36 (2)–(5) Statute of the → International Court of Justice (ICJ) (‘ICJ Statute’). This provides a mechanism, which enables parties to the Statute to lodge an optional clause declaration under which, subject to a number of provisos which are described below, they recognize the jurisdiction of the ICJ as compulsory as between themselves and other parties to the Statute which have made similar declarations (→ International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications). As between such parties, no special agreement to subject any particular dispute to the jurisdiction of the Court is required. A plaintiff party, which has lodged such a declaration, has only to file a case with the Court and submission to the jurisdiction of the Court by a defendant party which has itself lodged a reciprocal declaration is then compulsory.

B. Background and History

2 The idea of an international judicial institution, which would exercise compulsory jurisdiction, was not a novel one. Such an idea was presented at the → Hague Peace Conferences (1899 and 1907), where many participants wished to establish a → Permanent Court of Arbitration (PCA) with compulsory jurisdiction. The idea was not implemented but was not forgotten; and it attracted the support of public opinion and the interest of many powers.

3 The optional clause system of compulsory jurisdiction under the ICJ Statute is based on the regime devised under the Statute of the → Permanent Court of International Justice (PCIJ) by the Advisory Committee of Jurists in 1920 and submitted for approval of the Assembly of the → League of Nations. The system devised by the League of Nations was to be one of the elements to safeguard → collective security to give effect to the provisions of its covenant. It was decided that States which accepted the compulsory jurisdiction included in Art. 36 (2) Statute of the PCIJ (‘PCIJ Statute’) had to sign a so-called Protocol of Signature. The PCIJ Statute entered into force on 20 August 1921. The PCIJ held its last public hearing on 4 December 1939.

4 The → Dumbarton Oaks Conference (1944) proposals were instrumental in elaborating on the jurisdiction of the then proposed successor to the PCIJ, the ICJ. It was later followed up by the Committee of Jurists, which convened on 9 April 1945. The majority of States supported compulsory jurisdiction of the Court. The Union of Soviet Socialist Republics and the United States were in favour of the scope of the optional clause not exceeding the clause established by the PCIJ Statute. The final draft of the ICJ Statute was submitted to the San Francisco Conference. At this conference, the judicial organization of the → United Nations (UN) was vested in the Commission IV, which was composed of two committees, the first of which was responsible for the ICJ and the second, for the remaining legal problems. The final document of the ICJ Statute was officially adopted on 26 June 1945. Currently, over 60 States have accepted the compulsory jurisdiction of the Court.

C. Voluntary Nature and the Question of Reservations

5 The definition of the optional clause as denoting compulsory jurisdiction does not reflect its true character, as submission to this jurisdiction is entirely voluntary and affords a great degree of flexibility. States are free to append reservations of any type to their declarations: ratione temporis, ratione personae, and ratione materiae, which, though wider than the express provisions of Art. 36 (3) ICJ Statute, has been strongly affirmed in the jurisprudence of both the PCIJ, as in the → Phosphates in Morocco Case, and the ICJ, as for instance in the → Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America) (‘Nicaragua Case’), the → Fisheries Jurisdiction
Case (Spain v Canada), and the Aerial Incident of 10 August 1999 Case (Pakistan v India) (→ Aerial Incident Cases before International Courts and Tribunals). States decide upon the limits of their acceptance of the Court’s jurisdiction. States have the freedom to reformulate, limit, modify, and terminate their optional clauses. Such reservations constitute an integral part of the declaration accepting the Court’s jurisdiction. However, in the Nicaragua Case, the ICJ declared that withdrawal of a declaration of indefinite duration requires, according to the principle of → good faith (Bona fide) and by analogy to the law of → treaties, a reasonable time for withdrawal (→ Treaties, Multilateral, Reservations to; → Treaties, Termination). One controversial type of reservation is the so-called self-judging (or automatic) reservation, an example of which was the French reservation accepting the compulsory jurisdiction of the Court: ‘This Declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic’ (Norwegian Loans Case 21). Judge Lauterpacht, in his separate opinion in the → Norwegian Loans Case, considered the French reservation as:

an instrument incapable of producing legal effects before this Court and of establishing its jurisdiction. This is so for the double reason that: (a) it is contrary to the Statute of the Court; (b) the existence of the obligation being dependent upon the determination by the Government accepting the Optional Clause, the Acceptance does not constitute a legal obligation. That Declaration of Acceptance cannot, accordingly, provide a basis for the jurisdiction of the Court (at 44).

He further stated that such a reservation deprives the Court of the possibility of exercising the powers bestowed upon it by Art. 36 (6) ICJ Statute. In Judge Lauterpacht’s view, such a reservation, or part of it, is invalid. The same views were expressed by Judge Guerrero in his dissenting opinion in the Norwegian Loans Case. This question was raised with regard to the US reservation in the 1957 → Interhandel Case, which also contained a domestic jurisdiction reservation. Several judges, such as Judges Lauterpacht, Spender, and the president of the Court, Judge Klaestad, raised objections to such reservations. At present, there are five declarations in force with the domestic jurisdiction reservations: Liberia, Malawi, Mexico, Philippines, and Sudan.

6 The differences between the compulsory jurisdiction of the Court and other types of jurisdiction are that the former is based on declarations formulated unilaterally (→ Unilateral Acts of States in International Law), which are not the product of negotiations, and that the jurisdiction under Art. 36 (2) ICJ Statute allows States to pick and mix in an abstract and general manner the types of disputes they are willing to submit before the Court, should the opportunity so arise. In the cases before the ICJ concerning the legality of the use of force against Yugoslavia (→ Yugoslavia, Cases and Proceedings before the ICJ), the Court decided that on its terms, Yugoslavia’s declaration ‘accepted the Court’s jurisdiction ratione temporis in respect only, on the one hand, of disputes arising or which may arise after the signature of its declaration and, on the other hand, of those concerning situations or facts subsequent to that signature’ (Legality of Use of Force [Yugoslavia v Portugal] para. 25; [Yugoslavia v Netherlands] para. 26; [Yugoslavia v Canada] para. 25;[Yugoslavia v Belgium] para. 26). The Court further stated that in order to determine whether it had jurisdiction in the case, it was ‘sufficient to decide whether, in terms of the text of the declaration, the dispute brought before the Court “arose” before or after 25 April 1999, the date on which the declaration was signed’ (ibid). Having decided that the dispute arose one month before the signing of the declaration, the Court held that consequently, the parties’ declarations under Art. 36 (2) ICJ Statute did not constitute a basis on which the jurisdiction of the Court could prima facie be founded.
D. Reciprocity

The principle of \textit{reciprocity} is one of the fundamental characteristics of the optional clause. It is embodied in Art. 36 (2) ICJ Statute, which states that States accept the compulsory jurisdiction of the Court ‘in relation to any other state accepting the same obligation’. In the \textit{Nicaragua Case}, the Court said:

> The notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State’s own declaration whatever its scope, limitations or conditions (para. 62).

As the Court explained in the \textit{Norwegian Loans} Case, reciprocity in relation to the Court’s jurisdiction also meant that it was conferred upon the Court only to the extent to which the declarations coincided in conferring it. Consequently, the common will of the parties, which was the basis of the Court’s jurisdiction, existed within the narrower limits indicated by the French reservation. In accordance with the condition of reciprocity, Norway was entitled to invoke the French optional clause, which excluded the compulsory jurisdiction of the Court in relation to disputes understood by France to be essentially within its national jurisdiction. The reservation of France is a so-called automatic reservation, the legality of which was questioned, as Art. 36 (6) ICJ Statute explicitly authorized the Court and not the State to decide whether the Court has jurisdiction in the event of a dispute. This principle was also emphasized by the Court in, for example, the \textit{Fisheries Jurisdiction Case}. A reservation in which the State reserves for itself the right to determine whether a dispute is essentially within its national jurisdiction may be assessed as contrary to an express provision of the Statute, and therefore, must be deemed invalid.

E. Commencement and Duration of Reciprocal Obligations

Art. 36 (4) ICJ Statute, which provides that declarations have to be deposited with the UN Secretary-General (→ Depositary), who, in turn has to transmit copies to the parties to the Statute and to the registrar of the Court, is particularly important since it pertains to the point in time from which the reciprocal obligations of States arising from the optional clause declarations come into existence. In the \textit{Right of Passage over Indian Territory Case}, the Court interpreted Art. 36 (4) ICJ Statute as containing two separate, unrelated elements: the deposit of the State’s optional clause declaration with the UN Secretary-General, on one hand, and the duty of the UN Secretary-General to forward the declaration to the parties to the ICJ Statute, on the other. The Court further explicitly asserted that the date from which the reciprocal obligation of States arises and the legal nexus is established is the date when the declaration is deposited with the UN Secretary-General, not the date of receipt of the notification from the UN Secretary-General by the parties to the Statute. The \textit{Right of Passage over Indian Territory Case} doctrine was re-affirmed by the Court in the \textit{Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v Nigeria)}. It should be noted, however, that in that case, Nigeria put forward strong arguments as to why the \textit{Right of Passage over Indian Territory Case} should be reconsidered, in particular, on the basis of a lack of equity and reciprocity between the parties which it could entail (see also \textit{Equity in International Law}); and those arguments were supported in that case by the significant dissenting opinion of Vice-President Weeramantry.
In practice, the process of notification of the submission of such declarations by the UN Secretary-General may be delayed and in such a case, as a result of the doctrine in the *Right of Passage over Indian Territory Case*, a State may be sued on the basis of the compulsory jurisdiction of the Court without actually having prior knowledge that the suing State had joined the system of optional clauses. In order to avoid such situations, several States, such as the United Kingdom and Spain, exclude the jurisdiction of the Court in relation to lawsuits filed less than 12 months prior to the other party’s acceptance of the ICJ’s compulsory jurisdiction. This provision successfully provided a ground for lack of jurisdiction in relation to both the UK and Spain in the cases before the ICJ concerning the legality of the use of force against Yugoslavia, in which Yugoslavia filed its acceptance of the Court’s compulsory jurisdiction three days before it filed its 10 complaints.

F. Legal Character of the Declarations and the Principles of Their Interpretation

The legal character of optional clause declarations has a direct bearing on the rules of their interpretation, as was explained by the ICJ. In the *Nicaragua Case*, the Court made the following statement:

In fact, declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration. In the establishment of this network of engagements, which constitute the Optional Clause system, the principle of good faith plays an important role (para. 60).

In the *Fisheries Jurisdiction Case*, the ICJ stressed even more strongly the dual, *sui generis* character of the optional clause declaration: on the one hand, a declaration accepting the compulsory jurisdiction of the Court ‘is a unilateral act of State sovereignty’; on the other, it establishes a ‘consensual bond’, ie a nexus of obligations, and a ‘potential for jurisdictional link with other States’ (para. 46) and makes a ‘standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance’ (*Land and Maritime Boundary between Cameroon and Nigeria Case* [Cameroon v Nigeria] para. 25). Therefore, the Court stated in the *Fisheries Jurisdiction Case* that the interpretation of declarations under Art. 36 (2) ICJ Statute and any reservation appended thereto, ‘is directed at establishing whether mutual consent has been given to the jurisdiction of the Court’ and that ‘[a]ll elements in a declaration under Art. 36 (2), of the Statute which, read together, comprise the acceptance by the declarant State of the Court’s jurisdiction are to be interpreted as a unity, applying the same legal principles on interpretation throughout’ (para. 44). Further, since reservations to the declarations define the parameters of the State’s acceptance of the ICJ’s jurisdiction, there is no need to interpret them restrictively.

The general principle of interpretation of declarations and reservations (→ *Interpretation in International Law*), deeply entrenched in the Court’s practice and enunciated in many cases, such as the → *Anglo-Iranian Oil Company Case* and the *Norwegian Loans Case*, is that every declaration ‘must be interpreted as it stands, having regard to the words actually used’ (*Anglo-Iranian Oil Company Case* 105) and must be given effect ‘as it stands’ (*Norwegian Loans Case* 27). In the *Anglo-Iranian Oil Company Case*, the
Court observed that since the declaration is a unilaterally drafted instrument, the Court placed a certain emphasis on the intention of the depositing State.

14 As the Court further explained in the Fisheries Jurisdiction Case, the interpretation of the relevant words of the declaration and the reservation follows the ‘natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court’ (at para. 49). It should be particularly noted that the emphasis intended by the Court is on the individual and subjective intention of the depositing State, which is derived not only from the text of the relevant clause, but also from the context in which the clause is to be read and even from the examination of evidence regarding the circumstances of its preparation and the purposes intended to be achieved. In this respect, the rules of interpretation of declarations differ significantly from those relating to the interpretation of treaties themselves, in which it is the mutual intention of the parties which has to be established, requiring an altogether more objective approach.

15 Although the optional clause declaration results in a nexus of mutual relations, due to the unilateral character of declarations, the regime of interpretation of declarations is not identical with that of the Vienna Convention on the Law of Treaties (1969). In the Fisheries Jurisdiction Case, the Court noted: ‘the provisions of that Convention may only apply analogously to the extent compatible with the sui generis character of the unilateral acceptance of the Court’s jurisdiction’ (at para. 46).

G. Assessment

17 The optional clause system is a compromise between a system of purely consensual, ad hoc jurisdiction of international tribunals, which reflects the theory of the broadly voluntary basis of the subjection of States to international law (Consent), and the desire to introduce a full compulsory basis for the jurisdiction of the ICJ. As originally drafted, the system might have gone some way towards achieving the objective of compulsory jurisdiction if the making of unconditional declarations had become the general practice of States. In fact, however, the widespread practice of making reservations, which goes far beyond the limited reservations, as expressly allowed by Art. 36 (3) ICJ Statute, has weakened the whole system. The withdrawal of the declarations by some of the permanent members of the UN Security Council did not raise the status of this system. As the practice stands at present, the preferred manner of submitting to the Court’s jurisdiction remains the ad hoc agreement (Compromis). On the other hand, the new democracies in Europe, such as Poland, willingly submitted themselves to the optional clause system, thereby confirming their commitment to the jurisdiction of the ICJ. UN Secretary-General Kofi Annan appealed in his 2001 Report on Prevention of Armed Conflict for a broader participation in the optional clause system as a means of avoiding potential conflicts (UN Doc A/55/985-S/2001/574). This statement of the Secretary-General is commented upon by Judge Elaraby in his declaration to the 2006 judgment of the Court in the Armed Activities on the Territory of the Congo Case (New Application: 2002), where he states: ‘thus, while consent forms the cornerstone of the system of international adjudication, States have a duty under the Charter to settle their disputes peacefully. Recognition of the compulsory jurisdiction of the Court fulfils this duty’ (Declaration of Judge Elaraby para. 9). He also points out that:

some built-in limitations of the Statute, resonant of limitations of the international legal system generally, are relics of a past era which need to be revisited.... The Court may thereby play a stronger role in the peaceful settlement of international disputes and in enhancing respect for international law among States, thus contributing in fact to ‘bring[ing] about by peaceful means, and in conformity with
the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace (Art. 1, para. 1, of the Charter of the United Nations’) (ibid para. 10).

This statement shows in a very persuasive manner the paramount role of the ICJ and its compulsory jurisdiction.

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